Supreme Court, U.S.
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No. 03-257

In The
Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAIN RESOURCES COUNCIL INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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RULES 29.6 AND 14.1 STATEMENT

WBI Holdings, Inc. owns 100 percent of the issued and outstanding common stock of Petitioner Fidelity Exploration & Production Company. Centennial Energy Holdings, Inc. owns 100 percent of the issued and outstanding common stock of WBI Holdings. MDU Resources Group, Inc. owns 100 percent of the issued and outstanding common stock of centennial. No publicly-held company owns 10 percent or more of Fidelity stock.

Respondent in this case is Northern Plains Resource Council Inc., plaintiff and appellant below.

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INTRODUCTION

Respondent Northern Plains Resource Council and amici curiae (collectively, "Respondents") purport to defend the Ninth Circuit's decision, but disavow its pivotal finding that the issue in this case is "practically indistinguishable" from the issues in *Miccosukee*. Pet. 15a. Respondents assert instead that *Miccosukee* is irrelevant and, apparently, that the Ninth Circuit did not mean what it said. That is an odd, and erroneous, contention: The court held that the *Miccosukee* line of cases "apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another." Pet. 15a.

Accordingly, if *Miccosukee* is wrong, so is the Ninth Circuit's decision. The question in both cases is "practically" the same: whether the pumping and release of natural water, where nothing is added to that water, is an addition of a pollutant requiring an NPDES permit under the Clean Water Act. The Court granted certiorari in *Miccosukee* to resolve this important issue and it should likewise grant certiorari in this case.

I. AS THE NINTH CIRCUIT FOUND, THE ISSUE IN THIS CASE IS "PRACTICALLY INDISTINGUISHABLE" FROM THE ISSUES IN *MICCOSUKEE*

Respondents assert this case is different from *Miccosukee*, so the Court should ignore *Miccosukee* and its predecessors. The Ninth Circuit saw it differently. It made clear that the issue of whether Fidelity's groundwater is a pollutant "is practically indistinguishable from the issues

considered by these cases." Pet. 15a. Northern Plains tries in a footnote to wish away the Ninth Circuit's finding, suggesting the court actually found the cases distinguishable when it said they "practically" weren't. Opposition Br. ("Op.") 15 n.7.

Respondents protest that this case involves the question whether the water Fidelity releases is a "pollutant," but not whether the release of that water is the "addition" of a pollutant. As the Ninth Circuit recognized, however, the "pollutant" and "addition" issues are just flip sides of the same coin. Each depends on the other and is really just a different way of putting the other. Thus, whether the release of unaltered groundwater is the addition of a pollutant by a point source turns on whether that unaltered groundwater is a pollutant – if it is, then releasing it into another water body is the addition of a pollutant, but if it isn't, the release is not the addition of a pollutant.

This necessarily follows from the Act's plain words, which define "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, the question on which the Court granted certiorari in *Miccosukee*, like the question here, is whether the release of natural, unaltered water, where nothing is added to that water, is an addition of a pollutant requiring an NPDES permit.

The circuit court conflict further reflects the truth that the "pollutant" and "addition" questions are reciprocals. Under the *Gorsuch* line of cases, a release of natural water that differs from the receiving water, but to which pollutants have not been added from the outside world, is not the addition of a pollutant. Pet. 23-24. Under the

Miccosukee line of cases, natural, unaltered water that differs from the receiving water is a pollutant, so its release into the receiving water is the addition of a pollutant. Pet. 25-27. The Ninth Circuit followed the *Miccosukee* line of cases, and thus equated the question whether the released water is a pollutant to the question whether the release of that water is the addition of a pollutant. That is why the Ninth Circuit found the issues presented in the *Miccosukee* line of cases "practically indistinguishable" from the issue presented here.

Northern Plains itself proves that the pollutant and addition questions are reciprocals. Thus, it frames the question in this case as involving "the *addition* to the waters of the United States of pollutants." Op. i (emphasis added). *See also* Op. 10 ("This case involves the addition to navigable waters of pollutants. . . ."); and 23 (a permit is required "when a pollutant is added to navigable waters from a point source").[1]

Respondents also attempt to brush aside *Miccosukee* as involving a release of natural, unaltered surface water, not natural, unaltered groundwater. This is a distinction

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[1] Notwithstanding they are reciprocals, Respondents claim Fidelity should have labeled its argument below an "addition," not a "pollutant," argument. But substance, not labels, matters. In any case, this Court has made clear that a grant of certiorari is proper where an issue not pressed by the parties is nevertheless passed upon by the court of appeals. *United States v. Williams*, 504 U.S. 36, 41-42 (1992) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)).

without a difference. Under *Gorsuch* and *Consumers Power*, the proper question is whether the point source physically introduces pollutants from the outside world into the natural water being released, Pet. 23-25, not what part of the earth the natural water comes from. The point source in both cases introduced no pollutants into the natural water it released. Likewise, Fidelity introduced no pollutants into the natural water it released.

The Ninth Circuit meant what it said when it stated that the issue in this case is "practically indistinguishable" from the issues in *Miccosukee*. Respondents cannot wish away *Miccosukee*, or the deep circuit court conflict that it and the Ninth Circuit's decision in this case only make deeper.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER NATURAL, UNALTERED WATER IS A POLLUTANT

Respondents assert the Court should deny certiorari because there is no case holding that natural, unaltered groundwater is not a pollutant. But Respondents admit (Op. 18) that the only other circuit court case to address this issue is *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), where the water released contained "chemicals used in the drilling process." *Id.* at 550.[2] Thus, Respondents point to no circuit

[2] Respondents claim these facts are irrelevant, but then assert the Ninth Circuit's ruling here was based on the particular facts of this case. Op. 20. *Cedar Point* specifically found the discharged water was both an "industrial" and a "chemical" waste, 73 F.3d at 568, a clear reflection of the particular facts *in that case*, where the industrial

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court case, and there is no such case, other than the Ninth Circuit's decision here, holding that natural, unaltered groundwater *is* a pollutant under the Act.

The Act's plain terms establish that natural water is not a pollutant; *Gorsuch* and *Consumers Power* hold that the release of natural surface water to which nothing is added is not the addition of a pollutant; and there is no reason to treat natural groundwater differently. After all, natural water is natural water.

Northern Cheyenne nevertheless contends the unaltered water Fidelity releases is a pollutant, asserting "Congress intended to adopt a definition of 'pollutant' that would be 'at least as broad' as that found in the Refuse Act of 1899." Br. 8 (citing *United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977)). But this claim directly conflicts with the Clean Water Act's legislative history, which, as *Gorsuch* explained, demonstrates that Congress specifically replaced the "broad term 'refuse'" with the "restrictive phrasing" of "pollutant." Pet. 11-14 (quoting *Gorsuch*). If anything, Respondents' argument only raises still another conflict for this Court's review.

Recognizing that the Act's definition means what it says when it states that "pollutant" "means" specific items listed in the statute, Respondents, like the Ninth Circuit, attempt to fit unaltered groundwater into the category of "industrial waste." Under Respondents' logic, natural water that is not waste metamorphoses into "waste" whenever it is released to navigable waters in connection

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process added chemicals from the outside world to the discharged water.

with a commercial process, even though absolutely unchanged from its natural state. But there is no metamorphosis: it is, as the petition explained, the same unaltered water before and after the process.[3] Respondents have no answer.

Respondents assert that the groundwater Fidelity releases is "produced water" and "water derived in association with oil or gas production." As Respondents concede, however, these terms do not define "pollutant," but are found within an "exception" to the definition, 33 U.S.C. § 1362(6)(B). *See, e.g.*, Northern Cheyenne Br. 10, 11, 13. But something that isn't within the Act's definition of "pollutant" in the first place doesn't become a pollutant if it doesn't fit within an exception to the definition. Pet. 21.

Respondents turn the cannon *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") on its head, arguing that the exclusion of one thing is the inclusion of all others. Thus, Respondents assert that the exclusion in section 1362(6)(B) necessarily means that the definition of "pollutant" includes all releases that don't fit the exclusion. But the court in *Cedar Point*, which Respondents heavily rely upon, examined the same legislative history that Respondents misinterpret here and refused to read section 1362(6)(B) in this way. 73 F.3d at 568 & n.35.[4]

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[3] Northern Cheyenne concedes that the groundwater Fidelity releases has "many potential beneficial uses," Br. 9, and so undercuts the Ninth Circuit's reliance on a dictionary definition of "waste" as "any useless or worthless byproduct of a process." Pet. 10a.

[4] This is further evidence that *Cedar Point* only found produced water was a "chemical waste" and an "industrial waste" because

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Still, Respondents argue, because natural substances such as sand and rock are pollutants, so is natural, unaltered water. According to Northern Plains, a substance is automatically a pollutant if "some transformative human activity puts the substance in a place where it does not belong." Op. 21. This is an invention. First, "transformative human activity" in both *Gorsuch* (building a dam) and *Consumers Power* (generating electricity and destroying fish) put the water in its place and directed its release through a point source. Second, the proper inquiry is whether the substance is listed in the Act's definition of "pollutant." "Sand" and "rock" are, so they are pollutants. Natural, unaltered water is not, so it is not a pollutant.

Northern Plains' reliance (Op. 21) on *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), is misplaced. *Deaton* confirms that the inquiry is the one the Act sets out: whether there is "any addition of any pollutant to navigable waters from any point source." *Id.* at 335. The court observed: "The definition of pollutant ... specifically includes 'dredged spoil' that has been 'discharged into water,'" so dredged piles of dirt "were, without question, 'pollutants' within the meaning of the Act." *Id.* Discharging this dredged material "adds a pollutant that was not present before." *Id.* at 336. *See also Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (liquid manure is a "pollutant" because the Act's definitional list specifically includes "solid waste," "sewage," "biological waste," and "agricultural waste").

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chemicals were added to the water from the outside world during the industrial process. *See* 73 F.3d at 550, 568.

Finally, Respondents, like the Ninth Circuit, ignore the critical distinctions in the Act between "pollutant" and "pollution." The NPDES permit program applies only to the discharge of "pollutants," not water "pollution." Pet. 15-17. Northern Plains responds that this distinction is not "significant." Op. 8 & n.4. But it is. The Ninth Circuit relied on *Miccosukee* for the proposition that a discharge of natural water that differs from the receiving water is "pollution," and so requires a permit even though the discharged water is unaltered by man. Pet. 12a. But *Gorsuch* and *Consumers Power* hold that a permit is *not* required for the discharge of natural water to which nothing is added, though the discharged water is different from the receiving water. Pet. 23-25.

Gorsuch and *Consumers Power* are right. The Act requires a permit only for the discharge of a "pollutant," not for "pollution." In any case, this dispute only highlights the conflict between the circuit courts. Pet. 22-28.

III. THE NINTH CIRCUIT'S DECISION RAISES IMPORTANT ISSUES FOR THIS COURT'S REVIEW

Respondents assert that this case breaks no new ground. But at the same time they concede that *Cedar Point* is the only other circuit court case addressing the issue whether groundwater is a pollutant, and in that case, the water contained added chemicals from the industrial process. The Ninth Circuit's decision does break new ground – it conflicts with the *Gorsuch-Consumers Power* rationale, and it is the first to hold that *unaltered* groundwater is a pollutant.

Respondents predict a parade of horribles if Fidelity's releases were to go unregulated. But they already *are* regulated by the State of Montana, whose regulatory system ensures that water quality will be protected. Pet. 4-6, 15. That system requires a permit if the release of groundwater contains industrial waste or causes the receiving waters to exceed applicable water quality standards. *Id.*

Respondents assert there is no practical or immediate controversy, and the states and federal government are in harmony over this issue. But the Montana statute that the Ninth Circuit invalidated in this case, and the strident warnings that both *Miccosukee* and the present case set a dangerous precedent in the West (*Miccosukee*, Pet. Sup. Br. App. 5a-10a), belie this claim.

The Ninth Circuit's decision stands in support of the growing line of circuit court cases holding that "transporting water from one water body to another can violate the CWA." Pet. 14a. Like *Miccosukee*, the decision would greatly expand the NPDES program to cover virtually all releases of natural water, even though nothing is added to the released water. Echoing the Western Senators' concerns, Idaho's Governor cautioned that both decisions would work in tandem to hamper the states' authority and ability to manage water resources. *Miccosukee*, Pet. Sup. Br. App. 5a-10a. These issues, and the federalism principles that underlie them, are serious, present and in need of resolution.

The Clean Water Act means what it says. Natural, unaltered water is not a listed "pollutant" under the Act, no matter how hard Respondents try to make it one. The

Supreme Court should grant certiorari to rectify the excesses the Ninth Circuit's decision creates.

CONCLUSION

Fidelity's petition for a writ of certiorari should be granted and set for argument, or, in the alternative, granted and the case held pending the Court's decision in *Miccosukee*.

Respectfully submitted,

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